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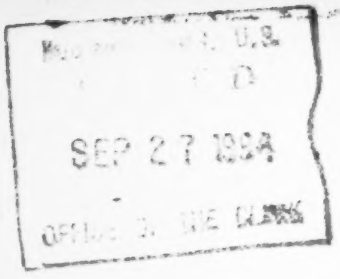

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

WILLIAM R. MCLENAGAN,
Petitioner,

v.

JOHN C. KARNES, LORETTA SMITH and
ANDREW J. WINSTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

The Respondents disagree with the Petitioner's statement of the questions presented. The questions presented by this petition are as follows:

1. Whether the Court of Appeals for the Fourth Circuit correctly held that Respondent John C. Karnes was protected by the doctrine of qualified immunity and by the Virginia doctrine of sovereign immunity;

2. Whether the Court of Appeals for the Fourth Circuit correctly ruled that Respondent Andrew J. Winston was not liable to the Petitioner; and

3. Whether the Court of Appeals for the Fourth Circuit correctly held that Respondent Loretta Smith was protected by the doctrine of qualified immunity and by the doctrine of sovereign immunity.

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Statement of Case

Respondent Deputy Sheriff Loretta Smith ("Smith") did not permit a detainee in her custody at a drunk driving checkpoint to "wander off." Instead, the detainee "jumped up and dashed into [the magistrate's] office." App. 28.

Respondent John C. Karnes ("Karnes"), a police officer, thought that the Petitioner had a weapon in his hands when Karnes fired his weapon. App. 41. Karnes never said that he saw that the Petitioner was unarmed. He thought that the Petitioner was the man with the gun to whom Smith was referring when she yelled, "The man has got a gun." App. 31, 41-42, 47.

Summary of Argument

This case presents no issue meriting review by this Court.

Smith is entitled to qualified immunity because the Petitioner has failed to show that her conduct was in violation of clearly established federal law. When faced with a sudden emergency caused by a detainee apparently rushing to grab a weapon, she yelled to alert the police officers and other people present. The Court of Appeals for the Fourth Circuit correctly ruled that Smith's actions violated no clearly established standard of substantive due process, and that the state law claim against her for gross negligence was patently without merit.

Respondent Andrew J. Winston ("Winston"), then the Sheriff of the City

of Richmond, was properly dismissed from the case because the Petitioner's state law gross negligence claim against him was patently without merit.

Karnes is entitled to qualified immunity because his conduct was objectively reasonable under the circumstances facing him. After being alerted by Smith's warning that a man has got a gun, Karnes saw the Petitioner rushing towards him in a crouched position. Believing him to be the man with the gun, he fired his weapon. The Court of Appeals for the Fourth Circuit correctly ruled that Karnes acted well within the range of behavior expected of a police officer. The court properly dismissed the state law claims for gross negligence and assault and battery since they were patently without merit.

Argument

1. Karnes -- Qualified Immunity.

Karnes is entitled to qualified immunity if his conduct was objectively reasonable under the circumstances known to him. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981); Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985); Anderson v. Creighton, 483 U.S. 635, 641 (1987). For conduct to be unreasonable, "the unlawfulness must be apparent." Anderson, 483 U.S. at 640. Summary judgment is appropriate on qualified immunity grounds if a reasonable police officer could have believed a search comported with the Fourth Amendment. Id. In addition, this Court in evaluating the conduct of police officers, has stated that "it is inevitable that law enforcement officials will in some cases

reasonably but mistakenly conclude that probable cause is present." Id., at 641. See, e.g., Graham v. Connor, 490 U.S. 386, 396-97 (1988); Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

Karnes heard Smith yell, "The man has got a gun." App. 37. Smith ran past him, followed closely by the Petitioner, running fast, stooped low, with his hands in front of him. App. 39. In Karnes' mind, he knew "this was the guy." App. 42. He fired his weapon, wounding the Petitioner. Clearly this was objectively reasonable conduct on the part of Karnes. He heard the deputy excitedly shout a warning about an armed man, and then Karnes was immediately confronted by a man rushing towards him. Karnes did not have time to interview this person, or make a careful visual examination to

determine whether the man was armed. Based on Smith's warning, Karnes properly believed that the Petitioner was armed.

In Slattery, a police officer at a drug arrest site ordered a car passenger to raise his hands after the officer saw him grasp an object. The passenger refused, and turned towards the officer, who then fired at him. The Fourth Circuit applied qualified immunity to the police officer, finding his conduct to be objectively reasonable under the circumstances. 939 F.2d at 215.

Similarly, Karnes' split-second decision to fire his weapon was objectively reasonable under the standards set forth in Slattery, and the Fourth Circuit properly ruled that he was entitled to the protection of qualified immunity.

The claims against Karnes for gross negligence and assault and battery must likewise fail, since his actions were neither wrongful nor negligent. Karnes was entitled to sovereign immunity under Virginia law, meaning that the Petitioner must show gross negligence to prevail. Colby v. Boyden, 400 S.E.2d 184 (Va. 1991). Karnes, however, was faced with the need to make a split-second decision. Under these circumstances reasonable minds could only agree that his actions were justified.

2. Winston -- No Liability.

The Petitioner seeks to hold Winston liable for Smith's allegedly gross negligence. However, since Smith, when confronted with an apparently armed man, yelled for help in keeping with her training, neither she nor Winston may be

liable under a gross negligence theory, since her conduct did not amount to a complete neglect of the safety of another. Frazier v. City of Norfolk, 362 S.E.2d 688 (Va. 1987).

3. Smith -- Qualified Immunity.

Smith is entitled to qualified immunity if a reasonable deputy could have believed that her conduct was not in violation of clearly established federal law.[1] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981); Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985); Anderson v. Creighton, 483 U.S. 635, 641 (1987).

A deputy sheriff on guard duty is entitled to the protection of qualified immunity. See, e.g., Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990). The

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[1] Violations of state law do not state a cause of action under § 1983. Davis v. Scherer, 468 U.S. 183 (1984).

Petitioner's argument that Smith was engaged only in ministerial duties on the night in question, and therefore not entitled to claim qualified immunity, collapses of its own weight -- the very essence of his claim relates to Smith's exercise of discretion in performing guard duty.

The Petitioner apparently concedes that Smith violated no federal law when she sounded the alarm to the effect that a detainee had a gun, because he has identified no cases holding otherwise. The Petitioner's argument that Va. Code § 15.1-138 creates a federally protected right is novel -- but it by no means states clearly established law of which a reasonable deputy would be aware.

The Petitioner also concedes that, instead of a federal claim against Smith,

at best he states a claim for negligence. Pet. at 26. However, the Court of Appeals for the Fourth Circuit has noted that the Supreme Court has left open the question of whether conduct short of intentional acts, such as recklessness or gross negligence, triggers protection of the due process clause. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 719 (4th Cir. 1991), cert. denied, 112 S. Ct. 1172 (1992).

Absent a claim of violation of clearly established law, Smith is entitled to qualified immunity.

As for the gross negligence claim against Smith, she is plainly entitled to sovereign immunity for her performance of discretionary duties; the Petitioner must for that reason show gross negligence in order to prevail. Colby v. Boyden, 400

S.E.2d 184 (Va. 1991). But the Petitioner concedes that Smith yelled out "The man has got a gun." This alone shows slight diligence, or scant care, sufficient to defeat a claim for gross negligence. Frazier v. City of Norfolk, 362 S.E.2d 688 (Va. 1987).

Conclusion

This case does not present a close question of law, and offers this Court no opportunity to explain any unclear premises of law. For the reasons stated, the Respondents respectfully request the Court to deny the Petition for a Writ of Certiorari.

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